NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 09 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JEFF DENNY,

Plaintiff - Appellant,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant - Appellee.

No. 04-35490

D.C. No. CV-00-01301-HU

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Dennis James Hubel, Magistrate Judge, Presiding

Argued and Submitted November 14, 2005
Portland, Oregon

Before: FERGUSON, KLEINFELD, and GRABER, Circuit Judges.

Plaintiff Jeff Denny appeals from an adverse judgment on his claims under the federal Family and Medical Leave Act of 1993 ("FMLA") and the Oregon Family Leave Act ("OFLA").

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

1. After a four-day trial, the district court found, with respect to Plaintiff's claim under 29 U.S.C. § 2615(a)(1), that Plaintiff's request for medical leave was not a "negative factor" in the decision to terminate him, Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1124-25 (9th Cir. 2001), and that Defendant Union Pacific Railroad had fired Plaintiff because of a heated exchange with his supervisor, during which he swore at his supervisor and asked his supervisor to "take it outside." The court's factual findings are not clearly erroneous. See Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985) (holding that the fact-finder's choice between two permissible views of the evidence cannot be clearly erroneous).

2. The district court's refusal to make a finding as to what Plaintiff actually said does not make the findings clearly erroneous. The question is not what Plaintiff actually said, but only whether Defendant fired him because of what Defendant believed he said, rather than for a reason prohibited by the FMLA. See Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1063 (9th Cir. 2002) (noting that it is unimportant whether the employer's otherwise permissible reasons for a termination were wrong, so long as it honestly believed them).

3. We need not decide what level of causation is required for a retaliation claim under 29 U.S.C. § 2615(a)(2). See Bachelder, 259 F.3d at 1125 n.11

(reserving question of what standard to apply under FMLA's anti-retaliation provision). That is so because of the district court's finding of fact that there was no causal relationship between Plaintiff's protected opposition to the denial of his request for leave and his termination.

4. Even if Defendant had been unjustified in denying leave, an issue that we need not resolve, the district court's findings are not clearly erroneous. An employee's opposition activity is "protected only if it is reasonable in view of the employer's interest in maintaining a harmonious and efficient operation." O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 763 (9th Cir. 1996) (internal quotation marks omitted). In other words, an employee's insubordination and fighting words are not protected merely because the underlying subject is protected.

5. The district court erred when it held that there is no recognized claim for retaliation under OFLA. After the district court's ruling in this case, Yeager v. Providence Health Sys. Or., 96 P.3d 862, 865 (Or. Ct. App. 2004), held that there is such a right of action.

Nevertheless, that error is harmless in the particular circumstances of this case. Plaintiff does not claim that there was additional or different factual evidence that he could have presented on the state claim but that he did not present on the

federal claim that went to trial. And, after a full trial on the merits of the federal claim, the district court found that Plaintiff was fired not for protesting the denial of leave, but for swearing at and offering to fight with his supervisor. In these circumstances, the parallel state claim could not have yielded a different result. See Or. Rev. Stat. § 659A.186(2) (noting that OFLA shall be construed in a manner consistent with similar provisions of the FMLA).

AFFIRMED.